In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court below is reported in 17 F. (2d) 663, and is printed at page 44 of the Record.

JURISDICTION

The judgment of the Court of Appeals for review was entered January 3, 1927. (R. 49.) The petition for certiorari was filed April 2, 1927, and granted pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are (1) whether the provision of the Revenue Act of 1924 giving the Board

of Tax Appeals jurisdiction to review the action of the Commissioner of Internal Revenue in determining that there is a deficiency in the amount of taxes paid by a taxpayer gives the Board jurisdiction to review the Commissioner's determination of the tax for a particular tax year as to which he decides that there was not a deficiency but an overassessment, merely because in considering several tax years together he determined that there was a net deficiency over the whole period, and (2) whether the action of the Commissioner in deciding that a taxpayer is not entitled to relief under the special assessment provisions of the Revenue Act of 1918, or in deciding what relief should be granted in applying the special assessment provisions, may be reviewed by the Board of Tax Appeals and by the courts.

STATEMENT

The Oesterlein Machine Company returned and paid Federal income and excess-profits taxes for the years 1918 and 1919 of $54,351.29 and $20,453.66, respectively. (R. 1.) In the final determination of these taxes the Commissioner of Internal Revenue considered at the same time the returns of this corporation for 1918, 1919, and 1920, and reduced the 1918 tax by $9,296.17 and increased the 1919 tax by $10,240.09. (R. 4, 10, 15.) The net result (which included an item of $182.45 for 1920, which is not questioned) for the three taxable years 1918, 1919, and 1920 was a balance of $1,126.37 against the company.

In determining the 1918 tax the Commissioner granted the taxpayer's request and made a special assessment under Sections 327 and 328 of the 1918 Act. For 1919 the Commissioner decided no ground existed for special assessment and determined the tax in the ordinary way. The respondent is dissatisfied with the result arrived at for 1918 in applying the special assessment provisions, and also with the refusal of the Commissioner to grant relief by special assessment for 1919, and is seeking to review the Commissioner's action by appeal to the Board of Tax Appeals, and the power of the Board to review the Commissioner's action was raised by him through resistance to a subpœna issued by the Board, requiring the production before the Board of the returns of other taxpayers in the same line of business, to enable the Board to review the Commissioner's action. The facts more in detail are set forth below.

In 1920 the Oesterlein Company was advised by the Commissioner that because the invested capital to be applied to its 1917 tax could not be satisfactorily determined, its tax for 1917 had been fixed by comparison with that of others engaged in similar business, under the Revenue Act of October 3, 1917, c. 63, Section 210 (40 Stat. 300, 307) (R. 2). At the time it received this information, its returns for 1918 and 1919, which had already been filed, reported an invested capital and a tax to be imposed. (R. 2.) Thereupon the Company submitted amended returns for 1918 and 1919, which omitted

the items of invested capital and tax. (R. 2.) It asked that its taxes for those years be fixed as its 1917 tax had been; that is, under the provisions of Sections 327 and 328 of the Revenue Act of 1918 .(R. 2–3.)

The Commissioner revised the Company's tax for 1918 and 1919 and determined a liability of $68,335.92 and $26,998.84, respectively (R. 1, 3), making this revision, however, without reference to the amended returns, and by application of the general, instead of the special, provisions of the Revenue Act of 1918; that is to say, by using an invested capital determined under Section 326 of that Act and by computing the tax according to the general method prescribed in Section 301 of the Act. (R. 3.)

The Company again requested a determination of its tax for 1918 and 1919 under Sections 327 and 328. (R. 3, 4.) The Commissioner yielded as to 1918 and applied for that year a rate established under Section 328, which reduced the tax for that year to $51,722.11 (R. 1, 4, 10). He declined, however, to fix the tax for 1919 under Section 328 and increased it about $4,000 (R. 4, 3).

The Company again protested, and the matter was in March, 1924, referred to, heard and considered by an agency in the Bureau known as the Committee on Appeals and Reviews. (R. 4, 5, 9, 10, 13.) That Committee, concurring in part with

the Commissioner, applied to the Company's 1918 tax a rate established under Section 328 (R. 5), and further recommended that the tax for 1918 be fixed at about $9,000 less than the Company had originally reported. The Committee was of the opinion that a tax of $45,055.12 for 1918, the amount finally imposed, was equitable to the Government and the taxpayer. (R. 4, 10.)

As to the 1919 tax, the Committee stated that it had "investigated the statistics of concerns which were suggested at the oral hearing and the statistics of additional concerns, and is of the opinion that assessment of the profits tax for the year 1919, under the provisions of Section 328 of the 1918 Revenue Act was properly denied." (R. 4.)

The Company thereafter, on August 22, 1924, appealed to the Board of Tax Appeals. It alleged (1) that although the Commissioner had determined its tax for 1918 under Section 328, the standard which he had created was defective and produced a tax greater than it ought to pay (R. 5, 11–13), and (2) that the Commissioner ought to have determined the tax for 1919 under Section 328 (R. 5, 11–19), because (*a*) he had been unable to satisfactorily determine its invested capital for 1917, (*b*) the net income for 1919 was abnormal (R. 12–13), and (*c*) its profits tax for 1919 was greater than the ratio of average net income to average invested capital of a group of corporations alleged by it to be representative (R. 13–14).

To obtain evidence showing the alleged disparity between the tax imposed upon it and that of others in the same business, the Company applied to the Board for authority to take the deposition of a witness (R. 5) and for a subpœna requiring the Commissioner to answer interrogatories and submit exhaustively itemized information from tax returns filed by twelve corporations named in the subpœna. (R. 5–6, 30–33.) The Commissioner denied the jurisdiction of the Board to authorize the deposition or to require a response to the subpœna because (1) in Sections 327 and 328 Congress delegated to the Commissioner exclusive nonreviewable power to determine whether relief should be granted to a taxpayer by applying the special assessment provisions and to fix tax rates in making special assessments (R. 16), and (2) the information submitted by other taxpayers had been received in confidence, and its disclosure was prohibited by law. (R. 34.)

The Board of Tax Appeals, the Supreme Court of the District of Columbia, upon an application for enforcement of the subpœna, and the Court of Appeals have successively overruled these objections. (R. 17, 35, 36, 42, 44, 49.)

STATUTES INVOLVED

Section 301 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1088) provides for assessment of war-profits and excess-profits tax by the general method of assessment, and its pertinent provisions are as follows:

SEC. 301. (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

FIRST BRACKET

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital;

THIRD BRACKET

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (c) of this section) a tax equal to the sum of the following:

FIRST BRACKET

20 per centum of the amount of the net income in excess of the excess-profits credit

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(determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

* * * * *

Sections 311 and 312, providing the formulæ for fixing the credits above referred to, are as follows:

SEC. 311. (a) That the war-profits credit shall consist of the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to the average net income of the corporation for the prewar period, plus or minus, as the case may be, 10 per centum of the difference between the average invested capital for the prewar period and the invested capital for the taxable year. If the tax is computed for a period of less than twelve months such amount shall be reduced to the same proportion thereof as the number of months in the period is of twelve months.

(b) If the corporation had no net income for the prewar period, or if the amount computed under paragraph (2) of subdivision (a) is less than 10 per centum of its invested capital for the taxable year, then the war-profits credit shall be the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to 10 per centum of the invested capital for the taxable year.

(c) If the corporation was not in existence during the whole of at least one calendar year during the prewar period, then, except as provided in subdivision (d), the war-profits credit shall be the sum of:

(1) A specific exemption of $3,000; and

(2) An amount equal to the same percentage of the invested capital of the taxpayer for the taxable year as the average percentage of net income to invested capital, for the prewar period, of corporations engaged in a trade or business of the same general class as that conducted by the taxpayer; but such amount shall in no case be less than 10 per centum of the invested capital of the taxpayer for the taxable year. Such average percentage shall be determined by the Commissioner on the basis of data contained in returns made under Title II of the Revenue Act of 1917, and the average known as the median shall be used. If such average percentage has not been determined and published at least 30 days prior to the time when the return of the taxpayer is due, then for purposes of such return 10 per centum shall be used in lieu thereof; but such average percentage when determined shall be used for the purposes of section 250 in determining the correct amount of the tax.

(d) The war-profits credit shall be determined in the manner provided in subdivision (b), instead of in the manner provided in subdivision (c), in the case of any corporation which was not in existence during the whole of at least one calendar year during

the prewar period, if (1) a majority of its stock at any time during the taxable year is owned or controlled, directly or indirectly, by a corporation which was in existence during the whole of at least one calendar year during the prewar period, or if (2) 50 per centum or more of its gross income (as computed under section 233 for income tax purposes) consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

(e) A foreign corporation shall not be entitled to a specific exemption of $3,000.

SEC. 312. That the excess-profits credit shall consist of a specific exemption of $3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year.

A foreign corporation shall not be entitled to the specific exemption of $3,000.

Sections 327 and 328, which are called the special assessment provisions of the Revenue Act of 1918, are as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and

the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the aver-

age tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * *

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of in-

vested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The jurisdiction of the Board of Tax Appeals is stated in the Revenue Act of 1924, Section 900 (c. 234, 43 Stat. 253, 336, U. S. C., Title 26, sec. 1211), as follows:

> (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.
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> * * * * *
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> (e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312.

Section 280 of the 1924 Act (43 Stat. 301, U. S. C., Title 26, sec. 1064) provides:

> If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be as-

sesed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Section 274 (43 Stat. 297, U. S. C., Title 26, sec. 1048) reads as follows:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

Deficiency is defined by the same Act, Section 273 (43 Stat. 296, U. S. C., Title 26, sec. 1047), as follows:

> As used in this title the term "deficiency" means—
>
> (1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts

previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SUMMARY OF ARGUMENT

I. The Board of Tax Appeals had no jurisdiction to review the Commissioner's decision as to the 1918 tax. It had jurisdiction under the Revenue Act of 1924 to review decisions of the Commissioner only where he determined that a deficiency existed and an additional tax was required to be paid. For the purpose of this provision each tax year must be separately considered. In this case the Commissioner considering the 1918 tax and 1919 tax at the same time determined that there had been an overassessment for 1918. The fact that he determined a deficiency for 1919, greater than the overassessment for 1918 and resulting in a net balance due the United States for the two years taken together, did not allow the Board to review his decision as to

1918. A right of appeal as to any tax year should not be given or taken away by the circumstance that the Commissioner does or does not consider a number of tax years at one time.

II. The result arrived at by the Commissioner in applying for the year 1918 the special assessment provisions of Sections 327 and 328, Revenue Act of 1918, and his decision that no ground existed for granting relief by special assessment for 1919 are not subject to review by the Board of Tax Appeals. The language of the statute shows that it was the intention of Congress to entrust the decision of these matters to the discretion of the Commissioner.

The very nature of the subject to be dealt with, the impracticability of having courts and juries attempt to apply these special-assessment provisions, the lack of uniformity which would follow, and the exposure to the public of the confidential returns of other taxpayers in the same line of business, which would result if the Commissioner's decision is reviewable, all support the conclusion that the granting of relief under these sections was intended to rest with the Commissioner alone.

ARGUMENT

I

THE BOARD OF TAX APPEALS HAD NO JURISDICTION TO REVIEW THE DETERMINATION OF THE 1918 TAX BECAUSE THE COMMISSIONER DID NOT DETERMINE THAT THERE WAS A DEFICIENCY FOR THAT TAXABLE YEAR

The jurisdiction of the Board of Tax Appeals to hear and determine appeals is conferred by the

provisions of Section 900 (e) of the Revenue Act of 1924. This section limits the jurisdiction of the Board to hear and determine appeals filed under Sections 274, 279, 308, and 312 of the Revenue Act of 1924.

In the case at bar we are concerned only with appeals filed under Section 274. This section provides that in the case of any taxpayer, if the Commissioner determines that there is a deficiency in the amount of tax which has been returned, the taxpayer shall be notified by registered mail and that within sixty days after such notice the taxpayer may file an appeal with the Board of Tax Appeals. The term "deficiency" referred to in that section is defined by Section 273 of the 1924 Act as (1) the amount by which the tax imposed exceeds the amount shown as tax by the taxpayer upon his return, or (2) if no amount is shown as the tax upon his return, or if no return is made, then the amount by which the tax exceeds the amounts previously assessed as a deficiency.

These two sections make clear that the existence of a deficiency is a condition precedent to the Board of Tax Appeals having jurisdiction to review the determination of a tax under Section 274.

The original tax return of the respondent for the taxable year 1918 showed an income and excess-profits tax of $54,351.29. (R. 1.) Later the respondent filed amended returns for the years 1918 and 1919 in which he omitted the items of invested

capital and the amount of the tax, and requested that the tax for both of these years be computed under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 2.) This request was granted for the year 1918 and the Commissioner computed the tax for that year to be $45,055.12. (R. 4.) The amount of the tax for 1918, therefore, as finally determined by special assessment, was actually $9,296.17 less than the tax shown on the original return. Accordingly, on the record here presented, the condition precedent to a review by the Board of Tax Appeals of the Commissioner's action respecting the 1918 tax by an appeal filed under the provisions of Section 274 (a) of the Revenue Act of 1924 does not in fact exist, and the Board has no jurisdiction.

It was argued below that although there was no deficiency for the year 1918 alone, nevertheless there was a so-called "net deficiency" for the years 1918, 1919, and 1920, considered together, which gave the Board jurisdiction to review the Commissioner's decisions for all three years. This contention is based upon the theory that if an overpayment in one year is applied against a deficiency in another year and the net result is a deficiency, the condition exists which gives the Board jurisdiction to consider all the years involved. But the statute is concerned with a taxable year and not with a balance that may be struck over a period of years. Otherwise, injustice and discrimination might be worked, because the grouping of several years

might in some cases prevent a taxpayer from having any right of appeal. The right of appeal should not be affected by the fact that the Commissioner finds it convenient to audit at one time the returns of a taxpayer for several years instead of auditing for each year separately at intervals, or, perhaps, give him a right of appeal as to some years, which he would not have if the taxes for those years had been considered at different times. In the case here, if the Commissioner had determined a deficiency in the 1919 tax and an overassessment as to 1918, which, when offset against 1919, would leave a balance in favor of the taxpayer, and hence no deficiency for the two years taken together, the Oesterlein Company, on its own theory, would have been deprived of the right of appeal from the determination of the deficiency for 1919. That it was the intention of Congress to determine the existence of a deficiency by reference to a single taxable year is borne out by a provision inserted in the Revenue Act of 1926. Section 274 (g) of that act (c. 27, 44 Stat. 9, 56, U. S. C., App., Title 26, Sec. 1049b) provides that "the Board in redetermining a deficiency in respect of any taxable year * * * shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

The express limitation of the Board's jurisdiction contained in the 1926 Act was declaratory of the existing limitation intended by Congress. Thus, during the debate in the Senate on the Revenue Act

of 1924, an amendment to extend the jurisdiction of the Board to refund and overpayment cases was proposed, criticized, and withdrawn, the principal criticism being because it would so largely multiply appeals as to require a membership on the Board running into hundreds. (Cong. Rec., Vol. 65, pp. 7696–7697.)

The Board of Tax Appeals has held that under the Act of 1924 it had power to review the decision of the Commissioner as to each of a series of tax years considered together merely because a net deficiency for the series of years taken together had been determined. (*Appeal of E. J. Barry*, 1 B. T. A. 156.)

It has been held that under the Revenue Act of 1926 it has no such jurisdiction. (*Appeal of Cornelius Cotton Mills*, 4 B. T. A. 255.)

II

CONGRESS DID NOT INTEND THAT THE BOARD OF TAX APPEALS SHOULD HAVE JURISDICTION TO REVIEW THE COMMISSIONER'S COMPUTATION OF A WAR-PROFITS AND EXCESS-PROFITS TAX MADE PURSUANT TO THE PROVISIONS OF SECTIONS 327 AND 328 OF THE REVENUE ACT OF 1918, OR TO REVIEW HIS DECISION THAT NO CASE EXISTED FOR THE APPLICATION OF THE SPECIAL ASSESSMENT METHOD

Assuming, for argument's sake, that we are wrong in the contention that, as no deficiency was determined for 1918 alone, the Board of Tax Appeals could not review the decision of the Commis-

sioner respecting the 1918 tax, there remain the points that in dealing with that year the Board was bound by the results arrived at by the Commissioner in applying the special-assessment provisions and that, in considering the 1919 tax, the Board could not overturn the decision of the Commissioner that no reason existed for applying the special-assessment provisions.

Sections 327 and 328 of the Revenue Act of 1918 were enacted for the benefit of the taxpayer. The object which Congress sought to accomplish in enacting these sections was to provide a special method of computing the tax, which would not be greater (and in most cases would be lower) in amount than if the tax had been computed under Sections 301 and 302 of the 1918 Act.

In the Revenue Act of 1917, Section 210 provided that if the Secretary of the Treasury was unable in any case satisfactorily to determine the invested capital, the tax should be based upon a method of computation which was similar to that later provided in Sections 327 and 328 of the 1918 Act. As the result of experience in the application of the provisions of Section 210 of the 1917 Act, Congress recognized not only its benefits, but the need of its extension. This is made clear by reference to the Report of the Senate Committee on Finance with respect to the 1918 Act (Senate Report 617, 65th Congress, 3rd Session, page 14). In this report it was said:

No part of Title III is as important as the so-called relief provisions. The business world is apprehensive about the operation of the war excess-profits tax, and it is true that the ordinary method of computing invested capital would in certain exceptional cases work great hardship. There is a measure of truth, for instance, in the current criticism that the war excess-profits tax places a heavy penalty on conservative financing and a corresponding premium on overcapitalization.

The committee therefore believes it necessary to provide a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality. To do this is not to confer an arbitrary discretion upon the administrative authorities; it is merely an exercise of the legislative power of reasonable classification. Indeed without such classification the constitutionality of the whole tax might, because of its unequal operation, be open to serious question.

The committee has materially increased the number of cases for which the House bill grants relief. It is not necessary here to enumerate these cases. It is sufficient to say that they represent the principal classes of cases which a year's experience with the excess-profits tax prove to be in need of special treatment. The committee moreover believes that these relief powers should not be hidden under vague and general phraseology. The business world is apprehensive of the opera-

> tion of a war excess-profits tax at the high rates which war exigencies make necessary. It is entitled to be reassured, explicitly and frankly, by the enactment of carefully safeguarded provisions for the relief or prevention of injustice and inequality.

This language shows that it was the intention of Congress that Sections 327 and 328 of the 1918 Act should be remedial. It was not contemplated that under this special method of computation a corporation would be assessed a higher tax than would be imposed if the computation were made under 301 or 302. In its brief below the respondent went so far as to state that (page 14) "taxes may not be raised under Section 328 over what they would be if computed under Sections 301 or 302."

Whether or not this statement be correct, the Senate Report evidences the intent of Congress to prevent great hardship and serious inequality in the operation of the tax law. Exercising the legislative power of "reasonable classifications," Congress divided corporation taxpayers into two groups. It placed in the first group those corporations upon which it believed no inequality would be imposed by the computation of taxes according to the method prescribed in the general assessment provisions. In the second group it included all those corporations which by reason of certain recognized conditions would suffer inequality if taxed according to the general assessment provisions. For this second group of corporations, therefore, the

special method of assessment was provided. The majority of corporations would fall within the first group and comparatively few within the second. But the two groups of taxpayers were recognized and provision for them was made in the Act in order that the system of taxation would operate as equitably as practicable.

The method of taxation prescribed in the general assessment provisions is based upon the principle that it is capable of definite, equitable application in the majority of cases, and the administration of these provisions permits of little, if any, latitude of judgment and discretion.

The administration of the provisions relating to the special method of assessment, however, presents in every case a problem requiring the exercise of sound discretion and discriminating judgment, in order that substantial equality may result in the administration of the Revenue Act. It was for the accomplishment of this purpose that Congress expressly provided, particularly in paragraphs (a) and (d) of Section 327 of the 1918 Act, that reliance be placed on the discretion and judgment of the Commissioner of Internal Revenue.

Congress must have recognized that it would be difficult to have uniformity in the administration of the special assessment sections unless the power to grant relief under these sections was vested exclusively in the Commissioner.

Under the decisions of this Court a determination by the Commissioner of the questions involved in those sections is final and conclusive and not subject to judicial review, unless the determination was clearly arbitrary or capricious, and that question is not presented here. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Silberschein* v. *United States,* 266 U. S. 221.

Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner, the only check on the exercise of that discretion (in the absence of charge of bad faith or arbitrary action) being the requirement that he should make his determination a matter of record and should report to Congress the cases in which he had applied the special-assessment provision.

Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so de-

clares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it is the Commissioner who must be unable satisfactorily to himself to determine these things, and it must be the Commissioner who finds and so declares of record that hardship would result, and it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, before special assessment shall be granted.

So, in Section 328, dealing with the making of the special assessment, it is provided that "the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined," and that the "ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner," and that "the Commissioner shall keep a record of all cases in which the tax is determined" by special assessment and report it to Congress when requested.

The decision below is to the effect that the special-assessment provisions in Section 328 may be applied if the Board of Tax Appeals or a court or jury is unable to determine the invested capital or if the Board or the courts are "unable satisfac-

torily to determine" the respective values of classes of property paid in for stock, or if the Board or a court or jury "finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions," impose hardship, and that it is open to the Board of Tax Appeals, and, consequently, to a court and a jury, to examine the mass of confidential material available in the Bureau of Internal Revenue respecting the business and taxes of other taxpayers engaged in the same line of business, and to compel the production of original evidence from such taxpayers in order to enable the Board or court or jury, as the case may be, to make the comparison with representative corporations and determine through such comparison an equitable rate of taxation. It is hard to believe that Congress intended any such result.

The respondent claims, and the courts below held, that the general provisions of the 1924 Act, giving the Board of Tax Appeals jurisdiction to review on appeal determinations by the Commissioner that deficiencies exist in the amount of the tax paid for any year by a taxpayer, give the Board power to review the determination of the Commissioner, which may enter into the determination of the deficiency, that the taxpayer is not entitled to special assessment, or, if he is, the determination as to what the rate should be by comparison with repre-

sentatives. This result does not follow from the general provisions giving jurisdiction to the Board to review determination of deficiencies. The provisions of the 1924 Act respecting jurisdiction of the Board and the provisions of Sections 327 and 328 of the 1918 Act should be construed together, and it should be held that the general power to review the determination of the Commissioner that a deficiency exists is subject to the qualification in special-assessment cases that, in so far as the determination of the Commissioner under the special-assessment provisions enters into the determination of the deficiency, his findings must be accepted by the Board, with the result, in cases like the present, that, where the review asked of the Board respecting a determination of deficiency involves *only* a review of the Commissioner's findings under the special-assessment provisions, the Board is without power to disturb them. To put it in another way: On an appeal, taken to review a determination as to a deficiency, whenever it appears to the Board, as it did appear in this case, that no question is raised except the propriety of the Commissioner's findings under the special-assessment provisions, the Board should cease to proceed further and should dismiss the appeal or affirm the finding of the Commissioner and not attempt to compel the production of evidence to enable it to review his finding. To support this construction of the statute, it is proper to emphasize the fact that the

construction adopted by the court below will result in opening to public inspection, at the instance of any taxpayer engaged in a particular line of business, the reports and confidential information on file with the Bureau of Internal Revenue of all other taxpayers engaged in a similar line of business, and will result further—since the courts may review the Commissioner's finding if the Board may—in the compulsory production before judicial tribunals and juries of original evidence from other taxpayers engaged in similar lines of business, in order to enable the court to determine, by comparison with representative corporations, the rate of taxation that should equitably be applied. This is so because in no case in which the Board may review the findings of the Commissioner, or a court may review those findings, are these tribunals limited to considering the evidence available in the files of the Bureau of Internal Revenue. No construction of the statute should be adopted which results in publicity of tax returns and confidential information which have been so carefully guarded by the other provisions of the Revenue Acts.

The decisions of the Court of Claims in *Williamsport Wire Rope Company* v. *United States,* decided May 2, 1927 (not yet reported and pending in this Court on certiorari), and of the District Court of the United States for the Northern District of Ohio in the *Feilbach Company* v. *Niles,* decided March 25, 1927, and not yet reported, both dealing

with this subject, are printed in the appendix hereto.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.

RUSSELL HARDY,
Special Assistant to the Attorney General.

HORACE R. LAMB,
Special Assistant to the Attorney General.

SEPTEMBER, 1927.

APPENDIX A

Court of Claims of the United States. No. D–1050.
(Decided May 2, 1927)

THE WILLIAMSPORT WIRE ROPE COMPANY *v.* THE UNITED STATES

ON DEMURRER

BOOTH, *Judge*, delivered the opinion of the court:

This is a tax case. The petition alleges a right of recovery upon two items. To the first item the defendant demurs. The facts alleged to sustain the cause of action are as follows: The plaintiff, a Pennsylvania corporation engaged in the manufacture of wire rope, on June 15, 1919, filed with the Collector of Internal Revenue for the proper district its income-tax return for the year 1918. Plaintiff then conceded an income, excess, and war tax liability upon the return so filed of $306,381.77, and the same was duly paid in four installments without protest. Subsequently the Commissioner of Internal Revenue, through Revenue Agents, made an examination of plaintiff's books of account, and on April 14, 1920, advised the plaintiff that a revised computation of its income-tax return had increased its tax liability for the year 1918 to the extent of $89,094.85. Plaintiff protested this action of the Commissioner, but the Commissioner made the additional assessment, and it was finally paid by the plaintiff under protest. Thereafter the Commissioner discovered an error in his computation resulting in an overpayment of

$12,393.09, which amount was on June 10, 1924, refunded to the plaintiff, leaving an aggregate tax assessed, levied, and paid by the plaintiff upon its return of $383,083.53.

On June 14, 1924, the plaintiff filed with the Commissioner a claim for a refund of $100,000, stating therein that the amount so claimed represented the amount by which its tax computed under section 301 of the Revenue Act of 1918 exceeded its tax computed under Sections 327 and 328 of the Revenue Act of 1918, insisting upon a right to have its tax liability computed in accordance with Sections 327 and 328 (*supra*). The Commissioner declined to refund. The petition further alleges that as a matter of fact as well as law plaintiff is entitled to have its excess-profits tax and war-profits tax computed in accordance with Sections 327 and 328 of the Revenue Act and not under the provisions of section 301 of the same law. To this end the allegation is made that it is impossible for the Commissioner or anyone else to determine the correct amount of plaintiff's invested capital as defined in section 326 of the Revenue Act of 1918; that abnormal conditions exist affecting the capital and income of the plaintiff which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it and its tax computed by reference to representative corporations engaged in the same trade or business. To sustain this allegation particular instances are cited. First, it is alleged that plaintiff pursued a policy of charging large sums expended for plant additions and improvements to an expense account and not to capital; second, that prior to the year 1918 plaintiff developed valuable secret processes essential to the

profitable operation of its business, and no part of the cost thereof has ever been capitalized, and the Commissioner ignored this fact in making up his adjustment of plaintiff's invested capital; third, that plaintiff, since its organization, has never undergone a reorganization or merger, but has since its organization in May, 1887, conducted an increasing and important business and thereby acquired a good will which asset is not recorded on its books and the value thereof was ignored by the Commissioner in ascertaining plaintiff's invested capital; that under regulations of the Commissioner, its good will is an asset of the value of $1,037,713; fourth, that plaintiff, during the year 1918 borrowed money to use in its business; that on January 1, 1918, plaintiff was using in its business $114,834.91, borrowed funds, and on December 31, 1918, for a like purpose was using $122,353.82; that its capital stock was $100,000; that at the beginning of the year its percentage of borrowed money to capital stock was 114.8 per cent, and at the end of the year 122.3 per cent; fifth, it is alleged that the salaries of its officers were abnormally low, averaging but 3.76 per cent of its taxable income for the year, and finally concluding with the allegation that a comparison of the rate of tax imposed upon the plaintiff with the rate imposed upon representative corporations engaged in a like trade or business would disclose the fact that as to the plaintiff the rate exacted is 63.87 per cent of its taxable income, whereas as to representative corporations the rate is not in excess of 55 per cent of their taxable income. The prayer for judgment is somewhat obscure. If we correctly apprehend it, suit is for the

recovery of $100,000 on this item with interest thereon from date of the payment of the final installment, viz: December 31, 1919.

Sections 327 and 328 of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1093) provide in terms as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other

income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments

shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid, together with interest at the rate of one-half of 1 per centum per month, on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Section 326 of the Revenue Act of 1918 (40 Stat. 1092) defines invested capital and is in terms as follows:

"(a) That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section);

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257;

"(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the

total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

"(b) As used in this title the term 'invested capital' does not include borrowed capital.

"(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

"(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

" The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years."

A tax case in this court is a suit against the United States founded under our jurisdictional act (Section 145, Judicial Code) upon a law of Congress. The right to sue for internal-revenue tax is conditioned upon its payment, application for a refund and denial of the same. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States,* 254 U. S. 141. Under the allegations of the petition, heretofore recited, it is obvious that the present suit is for a recovery of an alleged illegal tax exaction resulting from the alleged failure of the Commissioner to apply to plaintiff's tax return the applicable sections of the revenue law—i. e., Sections 327 and 328, *supra.* Plaintiff does not allege that if section 301 of the Revenue Act of 1918 has been legally applied in the assessment and levy of the taxes involved, an over or illegal assessment follows, and judgment for the amount paid thereunder is recoverable. On the contrary, the gravamen of the complaint is that Sections 327 and 328 of the Statute are the applicable sections of the law under which the assessment and levy should have been made, and if so made, would result in a difference of $100,000 in the amount paid and what should have been paid. The court is manifestly without authority to *compute* a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office, and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative

corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

Plaintiff admits that internal-revenue taxes are justly due from it to the United States. The issue presented by the petition goes only to the amount. We are not asked to set aside the assessment and levy made under section 301 and award judgment for all the taxes paid thereunder. The relief sought by the plaintiff is a judgment founded upon a law of Congress under which the plaintiff has not incurred a tax liability, under which it has been assessed no taxes, and under which it has paid no taxes. The plaintiff's taxes were assessed under Section 301. They were levied and collected under that section, and no complaint is made that if the section is applicable the amount assessed and paid is illegal. The plaintiff, in our view of the case, has mistaken the remedy. As said by the Supreme Court in the *Rock Island case, supra,* "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with." Clearly the plaintiff has paid no taxes under Sections 327 and 328 of the statute. The Commissioner has not levied or assessed any under the sections, and no claim for refund has been made or refused for any sum or sums exacted

of the plaintiff under the above sections. What sum the Commissioner might exact or might have exacted under the special assessment provisions relied upon is a problem with which under the petition we are not concerned, and until he does apply the provisions the court is powerless to proceed.

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special-assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On

the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo,* 234 U. S. 627; *United States* v. *Babcock,* 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States,* 268 U. S. 373.

The demurrer to the first item of the petition will be sustained, and as to that item the petition is dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice,* concur.

APPENDIX B

In the District Court of the United States for the Northern District of Ohio, Western Division. *The Feilbach Company, plaintiff*, against *Frank B. Niles, Collector of Internal Revenue, defendant.* At law, 3185

MEMORANDUM OPINION

KILLITS, J.:

Section 210 of the Revenue Act of 1917 must be considered to be an administrative provision for the guidance of the Commissioner of Internal Revenue in the determination of invested capital, upon which computation of excess-profits tax may be made in those somewhat unusual occasions when the very definite section (207) can not be applied. It seems obvious that the circumstances which would clothe the Commissioner with the discretion to apply Section 210 would occur somewhat rarely in the administration of the law, because Congress was somewhat meticulous in its definition of what invested capital should be considered to be, and how it should be ascertained, in the writing of Section 207, whose terms manifestly would meet the conditions in a vast majority of cases.

The section under consideration, 210, is one whose provisions are to be invoked primarily and most generally by the Commissioner alone. Very, very rarely, and under quite extraordinary circumstances, it would seem, can the section be resorted to as a mode of relief by the taxpayer. The statute limits resort to it to only when the Commissioner

finds that he can not "satisfactorily" ascertain invested capital for the computation of excess-profits tax under Section 207. It would follow that, if the Commissioner or his agents actually computes capital under 207, his action should be presumed to exclude any application of Section 210, the burden then being upon a claimant to relief under the provisions of the latter section to show that the Commissioner acted arbitrarily and without justification. It would be a rare case, indeed, wherein a court would be justified in concluding that the Commissioner could not "satisfactorily" apply the provisions of Section 207 to a determination of the question, when, in fact, the Commissioner satisfied himself that he could so do.

Reading the allegations of the petition in light of this consideration of the statutes in question and the Commissioner's action thereon, we find no reason for the interposition of the court in the form of a review of his judgment.

It is evident that Congress, in framing Section 207, intended not only to prevent vague and difficult determinations through the examination of circumstances hard to establish, but to set up standards of determination so rigid and so easily applicable that only a very extraordinary condition would justify a determination that the section was not workable. *Cartier* v. *Doyle,* 277 Fed. 150; *La Belle Iron Works* v. *United States,* 256 U. S. 377. Applying the authorities just cited and going to the four reasons set up as indicating that the Secretary of the Treasury in the instant case could not satisfactorily determine invested capital, we are unable to find that such a conclusion is a proper deduction. Section 207 seems to this court to read to the ex-

clusion of any one of these four alleged facts; nor do the four of them cumulated tend to take the present situation out of the operation of the section in question, and, therefore, afford the plaintiff relief. On the contrary, as we read Section 207, it negatives the ability of the taxpayer to resort to any of these reasons to exonerate it from the provisions of that section.

The demurrer, therefore, to the petition is sustained.

——— ———, *Judge.*

MARCH 25, 1927.

Office Supreme Court, U. S.
FILED
APR 21 1927
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE OESTERLEIN MACHINE COMPANY IN OPPOSITION.

JOHN J. HAMILTON,
ROBERT N. MILLER,
J. ROBERT SHERROD,
Counsel.

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58264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1016.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE OESTERLEIN MACHINE COMPANY IN OPPOSITION.

Opinions Below.

The opinion of the Court of Appeals of the District of Columbia will be found at page 42 of the record. The decision of the United States Board of Tax Ap-

peals will be found at page 16 of the record and in 1 B. T. A., 159.

Jurisdiction.

The judgment sought to be reviewed was entered January 3, 1927 (R., 46). Jurisdiction of this Court is conferred by chapter 347, of Title 28, U. S. Code (1926).

Question Presented.

The question presented is whether the United States Board of Tax Appeals has jurisdiction to review and, if necessary, redetermine *all* deficiencies in income and profits taxes determined and proposed for assessment by the Commissioner of Internal Revenue after the enactment of the Revenue Act of 1924.

Statutes and Legislative History.

The *tax-computing* sections of the statutes involved are sections 327 and 328, Revenue Act of 1918 (40 Stat., 1057, 1093). These sections read as follows (the italics herein are ours):

> "SECTION 327. That in the following cases the tax shall be determined as provided in section 328:
>
> "(*a*) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> "(*b*) In the case of a foreign corporation;
>
> "(*c*) Where a mixed aggregate of tangible property and intangible property has been paid

in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

"(*d*) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section, would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

"SECTION 328. In the cases specified in section 327 the tax *shall be* the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or

similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation, the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

"In computing the tax under this section the Commissioner *shall compare* the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"(*b*) For the purposes of subdivision (*a*) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * * * *

"(*c*) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (*a*), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to

such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257."

(40 Stat., 1057, 1093.)

The provisions of the Revenue Act of 1918, dealing with administrative procedure and methods of appeal (other than to the courts) are contained in Section 1301 (*d*), Revenue Act of 1918 (40 Stat., 1057, 1141), and read in part as follows:

"(*d*) (1) There is hereby created a board to be known as the 'Advisory Tax Board,' hereinafter called the Board, and to be composed of not to exceed six members, to be appointed by the Commissioner with the approval of the Secretary. The Board shall cease to exist at the expiration of two years after the passage of this act, or at such earlier time as the Commissioner with the approval of the Secretary may designate. * * *

"(2) The Commissioner may, and on the request of any taxpayer directly interested shall, submit to the Board any question relating to the interpretation or administration of the income, war-profits or excess-profits tax laws, and the Board shall report its findings and recommendations to the Commissioner.

"(3) The Board shall have its office in the Bureau of Internal Revenue in the District of Columbia. The expenses and salaries of members of the Board shall be audited, allowed, and paid out of appropriations for collecting internal revenue, in the same manner as expenses and

salaries of employees of the Bureau of Internal Revenue are audited, allowed, and paid.

"(4) The Board shall have the power to summon witnesses, take testimony, administer oaths, and to require any person to produce books, papers, documents, or other data relating to any matter under investigation by the Board. Any member of the Board may sign subpœnas and members and employees of the Bureau of Internal Revenue designated to assist the Board, when authorized by the Board, may administer oaths, examine witnesses, take testimony and receive evidence."

Under date of September 27, 1919, Daniel C. Roper, then Commissioner of Internal Revenue, made the following public announcement, which is reported at paragraph 866, Corporation Trust Company, War Tax Service (1922):

"Taxpayers in many parts of the country have expressed interest in the plans of the Bureau for continuing the important work entrusted to the Advisory Tax Board. The function of the Board has been to review, upon appeal, the administrative decisions of the Income Tax Unit in important income and excess profits cases, particularly cases involving exceptional or unusual conditions with respect to questions of invested capital, amortization, depletion, depreciation, etc. The newly organized Committee on Review and Appeals will take over this highly important function, and taxpayers are assured of the same thoughtful and im-

partial consideration of their problems that has been a feature of the work of the retiring Board.

"The individual members of the Committee on Review and Appeals will be selected with the greatest care from our most experienced men in order that their combined judgment may represent the best experience and highest intelligence of the Bureau's personnel. I am confident that this body of men will continue in a most satisfactory manner the work inaugurated by the Advisory Tax Board and taxpayers may be assured of courteous, intelligent and impartial hearings." (Announcement by Commissioner Daniel C. Roper, dated September 27, 1919.)

This Committee on Appeal and Review acted as the appellate body reviewing decisions of the Commissioner's auditors in the Income Tax Unit until shortly after the enactment of the Revenue Act of 1924 when it was abolished. (See T. D. 3616, Int. Rev. Cum. Bull. III-2, page 275.)

The administration of the Bureau of Internal Revenue was on and after March 14, 1924, the subject of a special investigation by a select committee appointed by the 69th Congress, Senate Resolution 168, and the Commissioner's determination of tax liability under the provisions of Sections 327 and 328, Revenue Act of 1918, was one of the especial subjects investigated. (Report No. 27, Senate, 69th Congress, 1st Session, pages 213-222. Report No. 27, Part 2, Senate, 69th Congress, 1st Session, pages 247, 284.)

Thereafter, in the course of the enactment of the Revenue Act of 1924 the following reports were made

by the Senate and the House Committees. (Quoted in part.)

Extracts from the Reports of the House and Senate Committees as to Conditions which Caused Congress to Create the Board of Tax Appeals.

"The Committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes." (House Report No. 179, 68th Congress, 1st Session, p. 7.)

"*Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him.* The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that *such an appeal does not involve a review by an impartial outside body,* such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts *both as advocate and judge,* since he must both protect the interest of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can

never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure." (Id., pp. 7 and 8.)

"*To meet the objections given above, the committee recommends that there be established a Board of Tax Appeals.*" * * * "*Both the Government and the taxpayer will appear before the Board and present their cases, and the decision of the Board will be final as to the amount of tax to be paid.*" (Id., p. 8.)

"The bill provides for the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment of an additional assessment* of income, excess-profits, war-profits, or estate taxes. * * *"

"Under the existing law a taxpayer prior to the payment of his tax may appeal to the Commissioner, *who has established the Committee on Appeals and Review to determine these appeals for him.*"

"Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, *prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals* and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal *both the Government and the taxpayer will appear before the Board to present their cases,* with the result that each member of the Board will sit solely as judge and not as both judge and advocate.

* * * *This proposal meets all the objections that have been raised as to the existing system* and at the same time provides for a flexible and informal procedure which will permit the Board to determine expeditiously the cases brought before it on appeal." (Senate Report 398, 68th Congress, 1st Session, pp. 8 and 9.)

The pertinent provisions of the Revenue Act of 1924 creating the Board of Tax Appeals read as follows:

> "SECTION 900 (*a*) There is hereby established a Board to be known as the Board of Tax Appeals (hereinaftter referred to as the Board). * * *"
>
> "(*e*) The Board and its divisions shall hear and determine appeals filed under Sections 274, 279, 308 and 312. * * *"
>
> "(*i*) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this act, and (3) the answer in writing under oath to any question of fact submitted. * * *"
>
> "(*k*) * * * The Board shall be an independent Agency in the Executive branch of the Government." (43 Stat. 253, 336.)

Section 273 provides:

"SECTION 273. As used in this title the term 'deficiency' means—

"(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, or refunded, or otherwise repaid in respect of such tax; or

"(2) If no amount is shown as the tax by the taxpayer * * * upon his return, or if no return is made by the taxpayer then the amount by which the tax exceeds the amounts previously assessed." (43 Stat. 253, 273.)

Section 274 provides:

"SECTION 274 (*a*) If in the case of *any* taxpayer the Commissioner determines that there *is a deficiency* in respect of the tax imposed by this *title*, the taxpayer, except as provided in subdivision (*d*) (the emergency assessment provision) shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.

"(*b*) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount

> determined as a deficiency by the Commissioner but disallowed as such by the Board, shall be assessed, but a proceeding in court may be begun without assessment, for the collection of any part of the amount so disallowed." (43 Stat. 253, 297.)

Section 280 provides that while taxes imposed by acts prior to the Revenue Act of 1924 are computed under those acts, they are to be assessed, collected and paid in the same manner and subject to the same provisions and limitations as taxes imposed under the Revenue Act of 1924. (43 Stat. 253, 301.)

STATEMENT.

We have no objection, for the purposes herein, to the petitioner's statement of the facts except in the following particulars:

(1) On page 3 of his petition he states that, in respect to 1918, he determined the rate of tax by comparison with "representative corporations" as provided in Section 328. One of the issues in the case before the Board is whether the petitioner compared respondent with "representative corporations," therefore this statement is denied.

(2) On pages 5 and 6 of his petition he states that the subpœna called for a complete disclosure to the respondent and the Board of Tax Appeals of "returns," etc. The respondent refers to Exhibit F (R., pages 26-29) and Exhibit G (R., pages 29-31) and calls

attention to the fact that neither the application nor the subpœna mentions the word "return." The respondent asked for only such data as was made pertinent and necessary by the provisions of Section 328 and which a representative of the Commissioner testified was considered by his office in similar cases. The Court of Appeals, in its decision, commented on the fact that respondent's application for a subpœna was "sufficiently specific to limit the data called for, to the particular records relevant to the case under consideration." (R., page 46.)

(3) The petitioner has repeatedly sought in the courts below, and in his brief herein, to give the impression that this case arises solely under the provisions of Section 327 (*d*), Revenue Act of 1918. The petitioner as early as 1929 determined "that owing to defective accounting your statutory invested capital cannot be satisfactorily determined" (R., par. 8, page 2). The case therefore also arose under Section 327 (*a*).

(4) The petitioner's "Reasons for Granting the Writ" are principally criticisms of the effect of the law which Congress has passed. Congress having provided for a review, it is now immaterial that review involves inconveniences. The petitioner refers to possible publicity; there is nothing new in this, since, as elsewhere pointed out, the President's regulations have for years provided that Treasury tax records are public records and any publicity resulting from their use in court is permissible.

The petitioner speaks of Sections 327 and 328 as provisions which grant "relief" by "grace." Since they are definitely enacted into law, to bring about equality, every taxpayer has an absolute right to have them applied to his case. It is not a question of grace. In the case of foreign corporations the law provides for no other way of determining the tax rate except Sections 327 and 328, and cases falling under subdivisions (*a*) and (*b*) of Section 327, Revenue Act of 1918, must be determined under these sections alone.

The petitioner suggests that as much as $100,000,000 might be involved, if the Tax Board or the courts are allowed to review the decisions of the petitioner. Since no substantive point is here involved, the Government will lose nothing if the petitioner's determinations under Sections 327 and 328 have been correct. If the petitioner's determinations have been incorrect, the only result would be that those mistakes would be corrected, and the taxpayers would get what the law gave them but the petitioner denied them, provided the statute of limitation does not interfere.

The petitioner's contentions have been denied by the United States Board of Tax Appeals, the Supreme Court of the District of Columbia, and the Court of Appeals of the District of Columbia, and the petitioner has now asked a further review by this Court on the ground that although Congress provided for review of "a deficiency" proposed for assessment against "any taxpayer," without making any exception, an exception should be implied because of language used in an act the administrative sections of which have been superseded by a new act.

ARGUMENT.

Briefly, the respondent's position is that the Revenue Act of 1924 expressly provides that the United States Board of Tax Appeals might review every tax deficiency which the Commissioner might determine under that or prior revenue acts. There is a net deficiency in this case of $1,126.37 (R., 42). The Board, in reviewing that deficiency, will do so in the light of all the provisions of any law involved, including the sections herein referred to.

Prior to the enactment of the Revenue Act of 1924, only one official of the Executive Branch of the Government had authority to determine the amount of income and profits taxes which could be assessed against any taxpayer. That official was the Commissioner of Internal Revenue. The Revenue Act of 1918 was written and enacted by Congress in the light of the then existing intention.

The office of the Commissioner of Internal Revenue is one of the most difficult and important offices in the Executive Branch of the Government. Whether justly or not, Congress had, early in 1924, criticized the administration of the Bureau of Internal Revenue, and had even gone so far, in March, 1924, as to appoint a committee to investigate its activities. The Revenue Act of 1924 was enacted June 2, 1924, and contained retroactive provisions, applicable to determination of tax under the earlier laws, as well as those under the Revenue Act of 1924, by which administration under

those earlier laws was definitely changed. No longer was the Commissioner of Internal Revenue and his Internal Revenue Bureau the final administrative authority in determining tax assessments. The 1924 Act provided that the Commissioner, except in emergencies, could only *propose* an amount of tax for assessment, and that assessment should be delayed, so as to give the taxpayer an opportunity for the final administrative review. If the taxpayer did not appeal to the new Board of Tax Appeals within 60 days, the Commissioner could assess and collect. If, however, the taxpayer did file an appeal, the Commissioner could not assess the tax until the Board redetermined or approved the amount. The reasons for thus curtailing the powers of the Commissioner is given in the reports of the House Ways and Means Committee and the Senate Finance Committee quoted hereinbefore. In short it was to place the final determination of *deficiencies* in tax in the hands of a Board divorced from the control of the Treasury Department or its Bureau of Internal Revenue.

It was evident that during the earlier years of its life the Board would require more members than it would later. Congress therefore refrained from establishing a court, involving life-tenure for each judge, and created a Board which is "an independent agency in the Executive Branch of the Government," at the same time giving it facilities for trying the appeals *de novo*, with full power to compel the production of evidence.

It has been admitted all along that the Board of Tax Appeals could not reach correct results in the appeal of this respondent without having before it the data called for in the subpœna. Furthermore, the Commissioner has taken the position many times before the Board that his own records are the best evidence as to the amount and percentage of tax assessed against other corporations, and has opposed the taking of depositions of officers of other corporations on that ground. The real crux of the matter is that the Commissioner thinks Congress was unwise in providing that his findings should be reviewed by a Board independent of his Bureau. Preferring the provisions of the acts which left him the final administrative authority, the Commissioner seeks to ignore the fact that Congress has made a law which changes the administrative determination of taxes under the earlier laws and provides a review "in respect to 'any taxpayer' who files an appeal in respect to 'a deficiency.'" The Commissioner bases his brief on the war legislation, and does not attempt to reconcile his position with the retroactive legislation which was enacted by an administration elected on a campaign slogan of return to the normal.

While the petitioner may deem Congress unwise in placing the determination of deficiencies in the hands of a Board, without excepting any of such deficiencies, we submit that the intention of Congress is clear that every deficiency shall be reviewed, and that it is beside the point to consider the wisdom or folly of what Congress has enacted.

It is difficult for the respondent to understand why the petitioner herein claims no board or court may review his determination of taxes under Section 328, Revenue Act of 1918, when he has in other cases *acquiesced* in changes resulting from such reviews. In the appeal of the Viscose Company, 3 B. T. A., 444, the Commissioner had refused to determine the tax under this section and the Board reversed the Commissioner's decision in this respect and ordered a determination under said section. The Commissioner published his acquiescence in this decision (Internal Revenue Bulletin, V-9, 2610). He admitted that he had erred in that case and the records of the Board show that the redetermination resulted in a tax reduction as follows:

1917	$1,466,836 25
1918	1,459,845 29
	$2,926,681 54

The Viscose Company case shows that the petitioner in that case committed error to the extent of nearly $3,000,000 in his application of sections 327 and 328, Revenue Act of 1918, that the Board pointed out such error, and that the petitioner thereupon corrected it. This seems to make it clear that review under these sections is not only feasible, but necessary. In view of petitioner's admissions in that case, his contention that his decisions should be or are final, is not convincing.

The petitioner herein persists in referring to Section 327 (*d*), Revenue Act of 1918, as governing this case. It is true that abnormalities of income and capital exist, but the case also falls within the provisions of Section 327 (*a*) because, under date of April 17, 1920, the Commissioner determined "that owing to defective accounting your invested capital cannot be satisfactorily determined" (R., p. 2, par. 8). If the Commissioner has any "discretion" under Section 327, whether reviewable or not, he has already exercised it and has acknowledged this to be a case for assessment under Section 328. However, the language of Section 328 does not indicate any unreviewable "discretion" on the part of the Commissioner. It provides that "the tax shall be * * *," and "the Commissioner *shall* compare," etc., language which is plainly a command. In many other sections of the 1918 Act, Congress, in the light of the fact that the Commissioner was *then* the *only* tax determining official, used language similar to that found in Section 327. For example, Section 212 (*b*) reads in part in regard to the determination of income—

> "The computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect income * * *" (40 Stat., 1057-1065).

The Commissioner has never claimed unreviewable discretion under the above and the Board and the courts have reviewed his determinations thereunder. See:

Appeal of David Welch, 2 B. T. A., 64.

Appeal of Theresa Goodman, 1 B. T. A., 915.

In re U. S. Metal Goods Company, 4 Fed. (2d), 871.

In re Max Sheinman (C. C. H. (1926), Fed. Ct. Service, p. 7627).

In Section 326 (*a*) (2) invested capital is defined to include—

> "(*a*) Actual cash value of tangible property other than cash bona fide paid in for stock or shares * * * but in *no case* to exceed the par value of the original stock or shares specifically issued therefor, *unless* the actual cash value of such tangible property at the time paid in *is shown to the satisfaction of the Commissioner* to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *" (40 Stat., 1057, 1092).

The Commisisoner's determination of actual cash value, under Section 326 (*a*) (2), for invested capital purpose has been the subject of review in so many cases before the Board of Tax Appeals and the courts, in which the Commissioner has acquiesced, that it is unnecessary to cite them.

The Board's jurisdiction to review the petitioner's findings under various sections rests on exactly the

same ground as its jurisdiction in cases where the determination is under Sections 327 and 328. It is unreasonable to suppose that Congress would constitute a Board of this kind and yet deprive it of jurisdiction in several large classes of cases where review is most needed.

The result of the petitioner's contentions is in effect that

> (*a*) No foreign corporation may have a review of his determination of its tax liability either before the Board of Tax Appeals or in court.
>
> (*b*) All individuals but only some of the domestic corporations may have such review.

There appears no good reason for assuming that Congress desired the Board of Tax Appeals to have less power and jurisdiction than had its predecessors, the Advisory Tax Board, and the Committee on Appeal and Review. These boards reviewed the Commissioner's determinations under Section 328 and under Section 210 of the 1917 Act (a similar section) and pointed out many errors.

See

A. R. R. 104, 2 C. B. 301.
A. R. R. 110, 2 C. B. 303.
A. R. R. 538, 5 C. B. 301.

The Board of Tax Appeals was established to take the place of the Committee on Appeal and Review and to eliminate some of the congestion in the Federal dis-

trict courts. If Congress had intended that it have jurisdiction of all deficiencies except those determined under Section 328, it could have and would have so provided. When Congress enacted the Revenue Act of 1926 the Board of Tax Appeals had assumed jurisdiction of this case. It could have then changed the situation. It made no such change.

The purpose of Congress in establishing several ways of determining the rate of tax (Sections 301, 302, and 328) was to equalize taxation; otherwise Congress would have provided only one way of determining the rate. For Congress to furnish means of review to one class of taxpayers whose taxes happen to be determined by Section 301 or 302, and deny review to those whose taxes are determinable under certain other sections, would make for inequality, not equality.

The Commissioner's view attributes to Congress the strange intention that all deficiencies of individual taxpayers shall be reviewable, and only some deficiencies of corporation.

While Congress has sometimes provided that an administrative official's decision shall be final, in specific instances where the Government is granting rights (land-grants, for instance), decisions under such laws are not in point in construing taxation laws, especially where express provision for review has been made. Because taxation involves taking, and not giving, Congress has never given the Commissioner of Internal Revenue finality in tax matters. Under each Revenue Act, a taxpayer, after unsuccessfully filing a claim for refund with the Commissioner, is given the

express right to test the propriety of the refund claimed by him, in court. In the Revenue Act of 1924, further administrative review is provided for.

In the lower courts the petitioner strongly insisted that the so-called "secrecy provisions" of the Revenue Acts prohibited the production of the facts desired. In his statement of the "Question" before this Court, he has not referred to this point, but his fifth specification of error inclines in that direction. The lower courts were shown the inconsistency of the petition in that where it serves his purpose he freely produces in court data similar to that asked for in this case. The court of appeals held that "the statute imposing secrecy on the Commissioner are not intended to impede the wheels of justice * * *" (R. 45).

The provisions of Section 900, Revenue Act of 1924, providing that—

> "The Board may require * * * the production of all necessary returns, correspondence and other evidence."

are nothing new or novel in legislation.

The President of the United States had before the enactment of the Revenue Act of 1924 provided that—

> "11. When it becomes necessary for the department to furnish returns or copies thereof for use in legal proceedings, inspection of such returns or copies that necessarily results from such use is permitted."
>
> (See T. D. 2961, 2 C. B. 250, 253.)

The Commissioner with the approval of the Secretary had declared prior to the enactment of the Revenue Act of 1924 that—

> "Income returns filed with the department are public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in Court unless there is some statute making it unlawful to use them as such (citing cases)."
>
> (See T. D. 2962, 2 C. B. 253.)

The Board of Tax Appeals and the Court of Appeals of the District of Columbia have written exhaustive, able opinions in this case. Mr. Justice Hoehling of the Supreme Court rendered an oral opinion to the effect that he thoroughly agreed with the Board's opinion that it had jurisdiction of *all* deficiencies determined after the enactment of the Revenue Act of 1924, where an appeal is taken. There is no conflict of opinion among the courts on the subject. We believe this Court, after reading the decision of the Board and the Court of Appeals, will see there is no reasonable ground for the issuance of a writ of certiorari in this case.

Respectfully submitted,

JOHN J. HAMILTON,
ROBERT N. MILLER,
J. ROBERT SHERROD,
Counsel.

April, 1927.